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ABSTRACT

This chapter addresses cases reported in 1982 involving aspects of school board governance. Topics covered include powers of state boards of education; powers and duties of local boards; open meeting laws; school boards and conflicts of interest; school district and board members' election, appointment, and recall; school district organization; and student transportation. (MJL)

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# 1

# GOVERNANCE

Thomas N. Jones

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## 1.0 INTRODUCTION

Administrators, teaching personnel, and school board members have an affirmative obligation to comprehend their legal duties and rights in

ıe school environment. This chapter will address decisional law hand-
ł down during 1982 in the general area of school board governance.
fore specifically, topics which will be covered include the powers of
ıe state board of education, powers and duties of local boards, open
ıeeting laws, conflicts of interest in the school setting, school board
lections, school district organization, and the legal issues of student
ransportation.

## 1.1 STATE BOARDS OF EDUCATION AND OTHER GOVERNMENTAL AGENCIES: SHARING THE AUTHORITY TO EDUCATE

A state board of education is either appointed by the governor or is
lected either on a partisan or nonpartisan basis. The following cases
xamine the legal basis and duties of the state board and the state com-
nissioner of education. The scope and extent of powers of the state
oard and state commissioner varies from state to state.

### .1a State Commissioners of Education

In a South Dakota case, judicial review was sought on a decision by
he state superintendent of elementary and secondary education in a
roceeding involving a minor school district boundary change. The
tate superintendent heard the appeal, conducted a full due process
ıearing and approved the transfer.

The Supreme Court of South Dakota held that neither the circuit
ourt nor the supreme court may substitute its individual judgment for
hat of the state superintendent in resolving school district boundary
lisputes.[1] The court added that the record supported the decision of
he superintendent in approving the boundary change, with applicants
nore closely aligned to economic, social and religious life of the
ransferee community and with the financial effect on transferor being
ıegligible. Therefore, the state superintendent's decision was neither
ontrary to law, clearly erroneous, arbitrary, capricious, nor an abuse
f discretion.

In an Article 78 proceeding from New York, the school board of New
ork City sought review of three substantive determinations of the
ommissioner of education and of the commissioner's decision denying
he board's application to reconsider the three determinations, all of
which concerned the tenure and seniority rights of six teachers.

1. Shumaker v. Canova School Dist., 322 N.W.2d 869 (S.D. 1982).

The state supreme court held that an Article 78 proceeding seeking to annul determinations of the commissioner relating to faculty tenure rights was barred by the school district's failure to commence the proceedings within the required period of four months after the determinations became final.[2] The court added that the discretionary power of the commissioner to rehear or reopen administrative determinations does not render an otherwise final order nonfinal.

The power of the state commissioner of education was litigated in another case from New York. A parent sought to annul a determination of the commissioner in finding his daughter ineligible for transportation to school. The court held that although the parent was entitled to review the determination of the commissioner, the sole issue on appeal was whether the commissioner's determination was arbitrary and capricious. The court concluded that in applying the proper standard, it could not be said that the commissioner's decisions was without rational basis.[3]

### 1.1b State Boards of Education

In a case arising from California, the community of Yorba Linda has its own elementary school district, but is part of the Fullerton Joint Union High School District. The state board of education approved a plan to create a new Yorba Linda Unified School District and transfer responsibility for high school education of Yorba Linda students from the Fullerton High School District to the new district. The state board directed that the proposal be submitted for approval in an election limited to the residents of Yorba Linda.

Fullerton High School District petitioned to prevent the election. The trial court upheld portions of the state board's decision, but held invalid the limitation of the franchise to Yorba Linda residents, and accordingly barred the election. Both parties appealed.

The Supreme Court of California held that the state board's decision to limit the vote to residents in Yorba Linda unconstitutionally infringed upon the voting rights of residents in the existing district since they had substantial interests in the election because it would have racial and financial impact on that district and could seriously affect the quality of education offered by the existing district.[4]

The denial by the Wyoming State Board of Education of an application for certification as a school district superintendent was upheld by

2. City School Dist. v. Ambach, 446 N.Y.S.2d 571 (N.Y. App. Div. 1982).
3. Gundrum v. Ambach, 433 N.E.2d 531 (N.Y. 1982).
4. Fullerton Joint Union High School Dist. v. State Bd. of Educ., 651 P.2d 168 (Cal. 1982).

the Wyoming Supreme Court.[5] The applicant clearly failed to meet certain education and experience requirements established by the board's certification regulations, and the board had denied his request for an exception to the requirements. Upon the applicant's petition to the district court for review of the board's action, the court had ordered the issuance of the certification.

The first issue decided by the supreme court was whether the power to make final decisions on certification applications was vested in the state board or in the state superintendent. The authority of the board had not been challenged, but the court chose to answer the question, in light of the pendency of a federal court case involving the same facts. As a matter of statutory construction the court ruled that the board was the final arbiter of such decisions, subject of course to judicial review of the administrative action.

The applicant's principal constitutional claim was that he had been denied due process of law since no member of the state board had been present at the three-day hearing held before a board-hired hearing examiner, who was a law professor from the University of Wyoming, and that the hearing examiner was not an employee of the agency as required by statute. The supreme court ruled that by entering into a contract for service with the board, the professor became an employee. The court stated:

> Here, the record reflects that at the time appellee requested a hearing the members of the State Board of Education had had substantial contact with the case, and in order to insure a full measure of fairness, they appointed an independent hearing officer to conduct the hearing. The record also reflects that the hearing was conducted openly and fairly with each party being permitted to introduce evidence and to conduct direct examination and cross-examination.... Finally, the record plainly supports the fact that the Board met and carefully apprised itself of the contents of the hearing record before rendering its decision. We therefore conclude that the (applicant) has been afforded his due process rights in full measure.

Finally, the court found that the state board's decision was supporte by substantial evidence, which it defined as relevant evidence that reasonable mind might accept as supporting the agency's conclusion.

The power of the state board in an annexation case was litigate recently in North Dakota. The local school district appealed the dec sion of the state board of education in granting petitions and approvi

5. Wyoming State Dep't of Educ. v. Barber, 649 P.2d 681 (Wyo. 1982).

annexation of certain lands lying within the school district to another school district.

The Supreme Court of North Dakota held that the state board's finding that annexation was an acceptable part of a comprehensive plan for reorganization of school districts was supported by the preponderance of evidence and was in accordance with state statute.[6]

## 1.2 POWERS AND DUTIES O.. SCHOOL BOARDS

### 1.2a General Powers

As a general rule, the judiciary will not interfere with the discretionary powers of boards of education unless the board's activities are arbitrary, capricious, or illegal. The source of power of a local school board stems from either the state constitution, the state legislature, or the state board of education.

In a recent Minnesota case, a board of education after much study of the factual situation and future probabilities took action to realign students among several buildings in the district. This involved transferring senior high school students from one senior high to another senior high building and converting the first mentioned building to all junior high use. One public meeting was held to give public input with the formal decision made later. Unhappy citizens and organizations undertook certiorari review of the board's decision. The trial court found the board failed to provide a timely and procedurally adequate hearing required by statute and that its closure decision was arbitrary, capricious, and unreasonable.

The board appealed to the state supreme court which held realignment of students among buildings and use of a building for education of students of a different grade level did not constitute "closing that school." Also, it was held that the board had authority to realign students and that neither the trial court or the supreme court had authority to substitute their decision for the decision made by the board. The supreme court reversed with instructions to vacate the permanent injunction.[7]

In a Louisiana case, the plaintiff, Stannard Broadcasting Company, was the owner and operator of radio station KVVP, located in Leesville, Louisiana. It filed suit against the Vernon Parish School Board and radio station KLLA in Leesville to annul the action of the

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6. Edmore Pub. School Dist. v. State Bd., 328 N.W.2d 31 (N.D. 1983).
7. Western Area Bus. and Civic Club v. Duluth School Bd. Indep. Dist., 324 N.W.2d 361 (Minn. 1982).

official broadcaster for Leesville High School football games during the 1981-1982 season, and further to enjoin station KLLA from using the room on the end of the press box at the school stadium.

On appeal, plaintiff stated there were three issues: (1) Does a school board have the authority to name an "official broadcaster for high school football games?" (2) If they do have this authority, should the Vernon Parish School Board have been estopped from taking such action which would go into effect for the 1981-1982 school year? (3) Did the actions of the school board in instructing the superintendent to notify the principal with regard to the use of the official press room violate the Louisiana Open Meeting Laws?

In its brief filed with the court, plaintiff conceded that the action may be moot since the 1981-1982 football season had been completed at time of appeal. However, plaintiff requested that the court decide the issue raised above.

The state court of appeals, in finding the present case moot, ruled that an established rule of Louisiana jurisprudence is that courts will not rule upon questions which have become moot. No judgment which the court could render could give the plaintiff the relief it sought.[8]

In an action from Pennsylvania based on theories that lights on the high school athletic field would be a public nuisance and that the school board abused its discretionary powers in granting permission for the erection of the lights, the trial court, after having concluded that no nuisance would occur if the proposed erection of lights were to take place, held that it lacked any equitable basis for reversing the actions of the school board regarding the use of the lights.[9]

It is undisputed that in most states only the school board can employ and terminate personnel. A recent decision addressed the board's authority in teacher termination cases. A Maine court ruled that a teaching job is not "property" subject to the fourteenth amendment's due process requirements under state law, that boards cannot make their hiring authority subject to grievance arbitration, and that they need only consider what is best for the schools when deciding which teachers should be laid off.

The Maine Supreme Judicial Court overturned a superior court ruling that the school board could not terminate a teacher under a continuing contract while retaining a probationary teacher to do approximately the same work.[10]

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8. Stannard Broadcasting Co. v. Vernon Parish School Bd., 422 So. 2d 591 (La. Ct. App. 1982).
9. Board of School Dirs. v. Kassab, 450 A.2d 282 (Pa. Commw. Ct. 1982).
10. Paradis v. School Admin. Dist. No. 33, 446 A.2d 46 (Me. 1982).

### 1.2b Delegation of Authority

The exclusive power of the school board to bind a district to a contract was litigated in a North Carolina case. Community Projects for Students, Inc. is a corporation in the business of selling various products which schools may use for fund-raising activities. In this case, the corporation sought to recover money due as the result of selling $4,106.40 worth of decorative oil lamps to a high school music teacher who wish[illegible] raise money for the school choir. The music teacher personally signed the sales contract, but there was no official or unofficial school board action taken regarding this matter.

The state court of appeals held that local school boards alone have the duty and authority to enter into or authorize purchases of supplies and equipment for their respective local school systems. The court held that there was no evidence tending to show that any contract was entered into between the corporation and the school board. Therefore, the corporation could not maintain its action against the board on the theory of the music teacher's express or implied authority to obligate the school board.[11]

### 1.2c Authority to Provide Instruction

A mandamus action was brought by parents against a Michigan board of education seeking continuation of a driver education program in the school district. In reviewing relevant state laws, the court of appeals ruled that the statute which provides that driver education courses shall be conducted by local public school districts controlled previously enacted general grant of power in school code giving local boards of education discretion to establish curricula that they deemed desirable and thus removed discretion from the school board and required it to offer driver education courses to eligible students.[12]

The Supreme Court of Alabama addressed the issue of the board's authority to provide day care centers for area students. The Jefferson County Board of Education offers child care services as an adjunct to its regular academic program. The child care services are offered under the auspices of the Community Education Department of the board, and while the scope and nature of the child care programs offered by the board vary somewhat from zone to zone, in accordance with the needs and desires of the local community, the basic child care services include supervision of recreational activities, including physical activity,

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11. Community Projects for Students, Inc. v. Wilder, 298 S.E.2d 434 (N.C. Ct. App. 1982).
12. Sharp v. Huron Valley Bd. of Educ., 314 N.W.2d 785 (Mich. Ct. App. 1982).

feeding of a snack, assistance with homework, and, when requested, special tutorial programs coordinated with regular school work.

Participation in these programs is voluntary and on a fee basis. The community education program of the board and the child care program, in particular, are "self-sufficient" in that all expenses are met by fees generated from the programs. All programs are conducted within existing school facilities.

The private owners of competing day care centers filed suit against the board and sought an injunction to prohibit the board from operating such centers. The plaintiffs claimed that the board was not empowerd to operate day care centers.

In holding for the board, the state supreme court ruled that the local board of education had authority conferred by statute and under authority to operate such day care centers.[13]

The procedural issue of standing was litigated in a Pennsylvania case concerning the board's duty to provide a certain number of days of instruction. From September 3 through September 24, 1980, members of the Upper Bucks County Vocational-Technical School Education Association engaged in a lawful strike of the school which resulted in the loss of sixteen instruction days.

Following the strike, the school board, which had inititally adopted a school calendar providing for 180 half days of instruction, adopted a new calendar for the 1980-1981 school year which provided for only 164 half days of instruction. The association, believing that this shortening of the school year was in violation of the terms of the board's policies and state statutes, joined with the individual plaintiffs in filing an action for declaratory judgment.

The lower court concluded that the association and individual plaintiffs lacked standing to challenge the shortened school year. The state appellate court, in reversing the lower court decision, stated that the fact that a plaintiff will be generally adversely affected does not in itself put a plaintiff in the class authorized to seek a declaratory judgment. Instead, a plaintiff must establish an interest which must be more than a general interst, and must have a direct, substantial and present interest, as contrasted with a remote or speculative interest. In this case, the court concluded that the association and individual taxpayers had standing to seek a declaratory judgment challenging the board's decision to shorten the school year. The fiscal impact that shortening the school year would have on taxpayers supplied the necessary "direct interest" between the plaintiffs and their right to bring suit.[14]

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13. Clark v. Jefferson Cty. Bd. of Educ., 410 So. 2d 23 (Ala. 1982).
14. Upper Bucks Cty. Voc.-Tech. School Educ. Ass'n v. Upper Bucks Cty. Area Voc.-Tech. School Joint Comm., 450 A.2d 295 (Pa. Commw. Ct. 1982).

### 1.2d Power to Contract

In most jurisdictions, school boards are quasi-municipalities and have the same power as does a municipal corporation. Therefore, boards are vested with the power to sue, be sued, and to enter into valid, enforceable contracts.

On April 22, 1980, a school board in Tennessee issued an "Invitation to Bid" on a contract to furnish 136 typewriters for use in the Metropolitan Nashville schools. Seven sealed bids were publicly opened on May 6, 1980. The low bidder was Farrar Business Machines which offered to furnish Optima typewriters for the total sum of $18,534. Capitol, the next lowest bidder, submitted an offer to furnish Remington typewriters for the total sum of $20,584.40.

The bids were evaluated by the Metropolitan Coordinator of Business Education to determine if the lowest bid met the specifications. After her evaluation she determined that Farrar's typewriters did not meet specifications and recommended that its bid be rejected by the board. The board then awarded the contract to Capitol, the next lowest bidder.

On May 30, 1980, the board mailed five purchase orders to Capitol. Thereafter a representative from Farrar met with the purchasing agent for the board and, after this meeting, he concluded that a mistake had been made and that the Optima machines which Farrar had purported to supply did meet specifications. On June 10, 1980, the board officially voted to rescind its contract with Capitol and to accept the bid of Farrar Business Machines. Capitol's suit against the board for breach of contract then ensued.

After a bench trial, the chancellor found that the board lacked authority to enter into a contract with the second lowest bidder. He found that the board is bound to award contracts to parties submitting the lowest bid and to do otherwise is an invalid exercise of authority. He concluded that the contract between Capitol and the board was ultra vires and unenforceable and dismissed Capitol's complaint.

The Tennessee Court of Appeals, in reversing the chancellor, held that the section of the Metropolitan Code providing that contracts will be awarded only to parties making lowest competent and responsible bids and the section of metropolitan charter providing for rejection of any and all bids, gave authority to the board of education to award contracts to furnish typewriters for use in schools to second lowest bidder. Therefore, the plaintiff bidder was entitled to recovery of anticipated profits.[13]

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[13] Capitol City Office Machs. v. Metropolitan Bd. of Educ., 632 S.W 2d 142 (Tenn. Ct. App. 1982).

The issue of school board authority to contract for public utilities was presented in an Ohio case. The court held that contracting for public utilities services is exclusively a municipal function under the Ohio Constitution. The state supreme court ruled that the board of education could not contract for public utility services without the express consent of the surrounding municipality, where such contract would substantially interfere with the power of the city to control public utilities which served its inhabitants.[16]

## 1.3 THE RIGHT OF THE SCHOOL BOARD TO ESTABLISH POLICY

The Michigan Court of Appeals in examining a case involving residency requirements stated that although school districts have policies discouraging students from living with persons other than their parents or legal guardians, these policies are aimed at preventing children from living away from their parents and enrolling in school districts strictly for educational reasons.

The court ruled that when the child's parents live outside the school district or are unable to care for the child and the parents have chosen to place the child with relatives within the district, the district may examine each case individually and accept the parent's signatures on forms attesting to the fact that the child's residence in that district with persons other than his or her parents is not solely for the purpose of enrolling the child in school in that district.[17]

In Louisiana, an association of educators and others brought an action against the school board alleging that the board violated its own written policies and rules when it employed a Dr. Lucas as coordinator of federal funds. Plaintiffs argued that in hiring Lucas without advertising the position and without developing a job description was in contradiction of several board policies. Plaintiffs claimed they were entitled to relief either through writs of quo warranto, mandamus, and/or mandatory injunction.

The state appellate court, in holding for the school board, ruled that: (1) plaintiffs failed to state a cause of action upon mandamus in absence of an allegation that the school board had a statutory duty to follow a set procedure in hiring its personnel; (2) plaintiff's failed to state a cause of action upon quo warranto in the absence of an allegation

16. Village of Lucas v. Lucas Local School Dist., 442 N.E.2d 449 (Ohio 1982).
17. *In re* Curry, 318 N.W.2d 567 (Mich. Ct. App. 1982).

that the plaintiffs were claimants to the petition in question; and (3) plaintiffs failed to perfect a case upon injunctive relief absent an allegation of specific facts from which it could be concluded that they would face irreparable harm absent a granting of an injunction.[18]

School board policies were attacked on first amendment grounds in two cases during the last year. In an Alabama case, four policies of the board, two relating to the distribution of literature on school campuses to students and faculty, and two relating to visitors on the school campus, were challenged based on the right to free speech.

The two policies regulating literature distribution provided that all material, political or sectarian in nature, distributed on any school site must have prior approval of the assistant superintendent of administration. The policies regarding school visitors provided in pertinent part that all visitors must report directly to the school office and final authority concerning visitation to the local school resides with the building principal or his responsible designee.

The controversy in this case arose out of a dispute over a teacher competency testing proposal favored by the school board, but strongly opposed by a group of teachers. The teachers brought suit challenging the constitutionality of the policies when the school administration disallowed the teachers' attempts to disseminate documents to fellow teachers, arrange meetings at the school, and to send speakers to such meetings.

The Fifth Circuit ruled that the policies concerning literature distribution to faculty members was unconstitutional both facially and as applied since they did not furnish sufficient guidelines to prohibit unbridled discretion on the part of the school board. The court noted that the policies were not ruled invalid because they required prior submission and prior approval of literature. Rather, the decision turned on the fact that as written, the policies did not furnish sufficient guidelines regarding the distribution of literature on school sites. The court added that the board can devise and implement policies permitting discretion needed to efficaciously operate the schools, while providing the clarity and procedures required by the first amendment.

The court further ruled that the two policies regulating visitors on school campuses were not facially unconstitutional for being overbroad or lacking sufficiently precise standards to guide school officials' discretion. These policies, applicable only to visitors from the outside, limit the school official's discretion to considerations of the safety, welfare, and education of the children.[19]

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18. Jackson v. Rapides Parish School Bd., 410 So. 2d 811 (La. Ct. App. 1982).
19. Hall v. Board of School Comm'rs of Mobile Cty., Ala., 681 F.2d 965 (5th Cir. 1982).

In a recent action from Louisiana, plaintiff filed suit against a school board seeking to enjoin the board from enforcing its rule prohibiting persons from bringing hand-held signs, regardless of content, into the school board meetings.

The Supreme Court of Louisiana held that communication by signs, placards or posters is closely akin to "pure speech" and is entitled to comprehensive protection under the free speech guarantees of the first amendment. However, the court pointed out that the first amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired.

The court stated that the school board policy providing that no sign which is carried by hand shall be permitted in the school board office building or in any of its rooms, leaves open ample alternative channels for communication of information contained on the signs, does not prevent the carrier from carrying the signs anywhere outside the school building, and does not deny access to the school board in violation of the first amendment.[20]

## 1.4 THE PUBLIC'S RIGHT TO KNOW: OPEN MEETING LAWS

### 1.4a Meetings

In most jurisdictions, school boards are allowed to go into executive session to discuss subjects specified in state statutes. Although all state laws vary to some degree, most states have held that the following topics may be discussed in closed session: student and personnel matters, collective bargaining strategy, discussion of the purchase of realty, and comments with the board's attorney regarding current litigation.

In Minnesota, members of the school board appealed from an order of the state district court finding that they had violated the open meeting law on two occasions.[21] The first occasion by a telephone conversation between the superintendent and a board member. The state supreme court, in reversing the lower court, held that the school superintendent, who was an ex officio member of the school board but not entitled to vote, was not a member of the "governing body" of the school district and therefore was not subject to the open meeting law and consequently the law was not violated. On the second occasion, the court held that a closed meeting of school board members to discuss

20. Godwin v. East Baton Rouge Parish School Bd., 408 So. 2d 1214 (La. 1982).
21. MINN. STAT. ANN. § 179.61 (1982).

labor negotiation strategies held at the request of the state mediator did not violate the open meeting law in that it was reasonable for the board to conclude that the mediator had impliedly authorized them to meet privately.[22]

In North Dakota, the school board held a closed executive session on March 17, 1980, to discuss school personnel. Danroth, the plaintiff teacher, was present at the beginning of the meeting but was asked to leave when the board went into closed session. At the closed session the board distributed teacher evaluations which were read and discussed; however, nonrenewals of teachers were not considered by the board at the closed meeting. The board, at a public meeting held on March 24, which was not attended by Danroth, considered and decided not to renew her contract and gave plaintiff notice of the contemplated nonrenewal by letter dated March 25, 1981.

The state supreme court held that nonrenewal had been determined as a result of a secret meeting held by the board and that the later open meeting was merely a pro forma ratification of discussions held at the secret meeting in violation of the open meeting law.[23] The court ruled that although the school board violated the open meeting law, the teacher was not entitled to be reinstated or to receive damages. The court stated that all that is required is for the board to reconsider its nonrenewal decision in open session.[24]

The definition of a school board meeting was the focal point in a recent Illinois decision. Plaintiff brought this action alleging violations of her civil rights by the seven individuals who comprise the local school board. Plaintiff alleged that she was excluded from a gathering at which all members of the school board were present and discussed school district business in violation of the open meeting law.[25] She contended that her exclusion from this gathering, which she characterized as a school board meeting, denied her constitutional rights of due process, equal protection, freedom of speech, freedom of association, and the right to petition the government.

The school board replied that the gathering in question was a political rally, that no discussion was held concerning school business, and that the parties charged, who were acting as private citizens, had a right to exclude the plaintiff.

The federal district court held that the fact that all members of the school board attended the political gathering and that issues of general

22. Minnesota Educ. Ass'n v. Bennett, 321 N.W.2d 395 (Minn. 1982).
23. N.D. CENT. CODE § 44-04-19 (1982). FED. R. CIV. P. 52(a) (1982).
24. Danrogh v. Mandaree Pub. School Dist., 320 N.W.2d 780 (N.D. 1982).
25. ILL. Smith-Hurd ANN. STAT. ch. 102, §§ 41, 41.02, 42 (1982).

public policy were discussed did not make the gathering a school board meeting. Therefore, the plaintiff was not entitled to attend the gathering under the open meeting law, and thus her constitutional rights were not offended when she was ejected from the gathering.[26]

### 1.4b Notice of Meetings

The issue of notice of school board meetings was litigated in a Massachusetts case. Plaintiffs, who were members of the teachers' union, appealed from a judgment declaring that provisions of the open meeting law were not applicable when the school board considered teacher layoffs based on budgetary constraints, and the board appealed from a ruling that it was required to reconvene in open session to ratify action taken in a properly held executive session.[27]

The appellate court held that the school board was authorized under the open meeting law to meet in executive session without sending notice to individual teachers when it was considering massive layoffs of teachers based on financial exigency. The court also ruled that the board was not required to reconvene to ratify its action concerning the layoffs, even though the purpose of meeting in executive session was related to litigation strategy to set the stage for a legal challenge of the job security clause of the collective bargaining agreement.[28]

In a case which will impact on the school setting, the Kansas Supreme Court sustained the constitutionality of the Kansas Open Meeting Act[29] in a case arising from the assessment of civil penalties against former county commissioners and hospital trustees in Thomas County. The facts of the case generally were that some of the public officials met twice with a hospital administrator in an adjacent county to discuss a possible management contract for the Thomas County Hospital. They also met once with an architect to discuss an energy conservation plan for the hospital. Although the commissioners had a practice of notifying the public of meetings, they did not notify anyone of the meeting called at the architect's request. Despite the fact that no member of the public had requested such notice before the first meeting, which was the basis of these convictions, the court upheld the convictions for that meeting.

The defendants argued unsuccessfully that their prosecution was improper because the Open Meeting Act was being selectively enforced, and that the act itself is unconstitutional because of the vagueness of the statutory description of the groups and the types of the meetings

26. Nabhani v. Coglianese, 552 F. Supp. 657 (E.D. Ill. 1982).
27. MASS. GEN. LAWS ANN. ch. 39, §§ 23 D (2), 23 B (3) (West 1982).
28. Doherty v. School Comm. of Boston, 436 N.E.2d 1223 (Mass. 1982).
29. KAN. STAT. ANN. § 75-4317.

which must be open to the public and of which public notice must be given. The court rejected those arguments, as well as the argument that since the defendants did not intend to violate the law, they could not properly be found to have violated the act. The court stated the common rule that it is the intent to do a particular prohibited act and not the intent to commit a violation of the law, that is significant in criminal-type cases, including those under the Open Meeting Act, which provides for civil penalties.

Although the dissent pointed out that no person had requested to be notified of meetings of the commissioners or the trustees before the time of the first meeting involved in this case, the Kansas Supreme Court apparently construed the act very broadly and read into it an affirmative duty to give some kind of public notice of any meeting, regardless of the existence of any requests for such notice, and in addition to such notice.[30]

### 1.4c Taping Meetings of the Board

Petitioners sought review of an order of the Polk County District Boundary Board denying their petition to have their real property transferred from the Perrydale School District to the Dallas School District.

After petitioners had filed their petition seeking a change in the school district boundary lines, and proper notice had been given, a hearing was held on September 21, 1981. At that meeting petitioner John Meser presented a written statement and oral testimony on behalf of all petitioners. The superintendent of the Perrydale School District appeared in opposition to the change. The board postponed its decision until its next meeting. At that meeting, on October 19, 1981, petitioners were informed that the board's tape recorder had not been working during the September meeting and that the only record of that meeting that was available was the minutes and the written statement submitted by petitioners. When asked if he had any objections to the minutes, Messer indicated that he did object because the minutes did not contain the testimony that had been given. The board proceeded, however, to adopt the minutes and then turned to the merits of the boundary change. On motion of one of its members, the board voted to deny the petition.

The petitioners argued that the discussion of the board was not supported by substantial evidence. The state appellate court, agreeing with the petitioners, held that the record before it did not contain

30. State *ex rel.* Murray v. Palmgren, 646 P.2d 1091 (Kan. 1982).

substantial evidence to support the findings of the board. The minutes of the September meeting indicate only that the Perrydale superintendent made a statement in opposition to the petition. The testimony underlying the missing entry was apparently the basis of the board's finding.[31]

### 1.4d Requests for Information

A case arose out of a Michigan school district's refusal to disclose the names of certain students suspended at a meeting of the board of education. On November 17, 1980, a special meeting of the River Valley Board of Education was held. The meeting was open to the public. At the request of the parents of six students, the board met in a closed session to discuss and consider the possible suspension of the six students. At the conclusion of the closed session the board reconvened in open session and adopted three resolutions suspending the six students from the school for alleged drug-related activities on school property. The students were not identified by name during the open session of the meeting, but were identified by their student numbers.

The Palladium Publishing Company, publisher of the local newspaper, requested the names of the students and the board denied the request. Palladium filed suit to declare that the board's actions were in violation of the Open Meetings Act.[32]

The lower court held that there is no constitutional right of the press as such involved, but that the Open Meetings Act interpreted in reference to the law as it now stands, requires the naming of a suspended or expelled student at the meeting and in the board's minutes when such student is expelled or suspended by action of a board of education.

The state appellate court agreed with the lower court that the constitutional claim of the plaintiff was without merit. The court stated that regarding the obtaining of public information, the press stands in exactly the same position as the public-at-large. The court ruled that in order for the board of education to act upon the suspension of a student, the minutes of the board meeting must contain the student's name. The facts cannot be hidden by using the student's idenfitication number.[33]

The District Court of Lyon County, Kansas denied the request of a teacher appealing the nonrenewal of his contract to put into evidence depositions of four members of the board of education. The issue involved the requirement of the Due Process Procedure Act,[34] which

31. Messer v. Polk Cty. Dist. Boundary Bd., 648 P.2d 1369 (Or. Ct. App. 1982).
32. MICH. COMP. LAWS § 15.261 (1970).
33. The Palladium Publishing Co. v. River Valley School Dist., 321 N.W.2d 705 (Mich. Ct. App. 1982).
34. KAN. STAT. ANN. § 72-5439(f)

guarantees the teacher the right to a fair and impartial decision based on substantial evidence.

The teacher had sought to enter into evidence the depositions, containing questions and answers about the factors considered by the board members as they made the decision to not renew the contract. The teacher alleged that, while there may be a presumption that administrative officials performing "quasi-judicial functions," such as deciding whether there is substantial evidence to justify nonrenewal, had considered the record and all other available evidence and arguments of counsel, the presumption is rebuttable by proper evidence. The teacher wanted limited inquiry into the nature and extent of the board's consideration of all available evidence.

The court held that it was improper for school teachers to inquire into the board's mental processes in reaching a decision to terminate their teaching contracts. It held that to permit inquiry, even limited inquiry, into the administrative body's consideration of the evidence would be to circumvent the mental process rule. The school board's request to exclude the depositions was granted.[35]

In a case from New Hampshire, plaintiffs, a teachers' association, filed a petition for injunctive relief seeking the right to inspect and copy minutes of all executive sessions of the school board since January, 1980. The lower court impounded the minutes and transferred the case directly to the state supreme court without ruling on the issue. The Supreme Court of New Hampshire held that the minutes must be made available for public access at any time.[36]

## 1.5 SCHOOL BOARDS AND CONFLICTS OF INTEREST

In Virginia, Kootz and Malcolm, who held administrative positions in the public school system, filed a bill for declaratory judgment seeking a determination as to whether, as members of the County Board of Supervisors, they were prohibited by the Conflicts of Interest Act[37] from voting on the appointment of members to the county school board.

Kootz was elected to the board in 1975 and was a principal in the school district. Malcolm was elected to the board in 1976 and was general supervisor of instruction for the school system.

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35. Tolliver v. Board of Educ., No. 82-C-29 (Kan. Dist. Ct. Lyon Cty. 1982).
36. Orford Teachers' Ass'n v. Watson, 451 A.2d 378 (N.H. 1982).
37. VA. CODE § 2.1.

The Virginia Conflicts of Interest Act states in pertinent part that:

> Any officer of employee of any governmental agency or advisory agency who knows, or may reasonably be expected to know, that he has a material financial interest in any transaction, not of general application, in which the agency of which he is an officer or employee is or may be in any way concerned, shall disclose such interests to the governing board thereof, and disqualify himself from voting thereon or participating in any consideration thereof in behalf of such agency.[38]

The Supreme Court of Virginia held that the Act which requires any officer or employee of a governmental agency to disqualify himself from voting or participating in consideration on any transaction in which he has a material financial interest prohibited members of the county board who held administrative positions in the county public school system from voting on the appointment of members to the county school board, since, as employees of the school board, they had a material financial interest in the appointment of school board members.[39]

## 1.6 SCHOOL DISTRICT AND BOARD MEMBERS ELECTION, APPOINTMENT, AND RECALL

### 1.6a Voting Irregularities

In Indiana, plaintiffs filed a petition to change method of selection of board of trustees of the Spring Valley School Corporation with the county clerk. The clerk certified to the board of trustees that 659 registered voters of the school district signed the petition and that a total of 3,153 registered voters resided within the boundaries of the school corporation. State statute mandates that the board must consider all proposed changes in the selection process of the board of trustees when twenty percent or more of the voters sign such a petition.[40]

The board adopted a resolution expressing its opinion that the petition was invalid. Plaintiffs filed a mandamus action alleging that the petition contains the signatures of more than twenty percent of the registered voters of the school district, and the board was required by law to undertake certain actions therein.

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38. *Id.*
39. Ambrogi v. Kootz, 297 S.E.2d 660 (Va. 1982).
40. IND. CODE § 20-4-10.1-5(a)(1).

The trial court determined that the petition was invalid. The court found that of the 659 signatures on the petition, eleven were duplicates, three were not accompanied by the date of signing, and twenty-four contained insufficient indicia of the residence of the signatory. Reducing the total number of signatures to 621. Since 3,153 registered voters reside within the boundaries of the school corporation, twenty percent thereof would equal 631, a figure in excess of the 621 signatures found to be valid.

The court of appeals reversed, ruling that since the clerk of the county was able to accurately determine whether twenty-four signatures in question were registered voters of the school corporation at appropriate time, trial court erred in finding twenty-four signatures invalid for reason that residences of signatories were insufficiently indicated, and consequently, since number of valid signatures on petition to change method of selection of board of trustees of school corporation was in excess of twenty percent of registered voters of school corporation, the board was under clear legal duty to take appropriate action in considering the petition as mandated by state statute.[41]

Interpretation of the New Jersey school board appointment statute was at issue in a recent case. This action involved a challenge to the manner of apportioning membership of the Shore Regional High School Board of Education. The regional district comprises the boroughs of Monmouth Beach, Oceanport, Sea Bright, and West Long Branch.

State statute provides that in making the apportionment of seats among the four constituent school districts, there shall be subtracted from the number of inhabitants of a district the number of such inhabitants who are military personnel.[42] Located within the borough of Oceanport is an United States Army installation. Based upon this statutory mandate, the regional superintendent notified the boroughs that representation from the borough of Oceanport was to be reduced from three seats to two. Plaintiff was a current member of the regional board from Oceanport. If the apportionment directed by the regional superintendent took place it was her seat which would be lost by Oceanport. Plaintiff claimed denial of equal protection. The state court of New Jersey held that the apportionment statute requiring subtraction from the number of inhabitants of a constituent school district of such inhabitants who are military personnel was unconstitutional as a denial of equal protection.[43]

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41. State *ex rel.* Land v. Board of Trustees of Spring Valley School Corp., 430 N.E.2d 791 (Ind. Ct. App. 1982).
42. N.J. STAT. ANN. § 18A:13-8 (West).
43. Oceanport v. Hughes, 451 A.2d 966 (N.J. Super. Ct. Ch. Div. 1982).

### 1.6b Election Contests

In Missouri, contestants challenged the results of a school district election in which the school tax proposition passed by three votes and on recount passed by only two votes. The trial court ordered a new election on the ground that there were irregularities in the election of sufficient magnitude to cast doubt on its validity. Contestants asserted irregularities in three major areas: voter registration, ballot defects and absentee voting.

The official ballot had the voter vote "for the additional levy" or "against the additional levy." At the bottom of the official ballot was the following:

> Instruction to Voters: If you are in favor of the proposition, place an X in the box "Yes". If you are opposed to the proposition, place an X in the box opposite "No".

Contrary to this instruction, there were no boxes for making "Yes" or "No". There was no evidence that any voter was actually misled or caused to cast a vote contrary to his intention. Absentee voting irregularities provided the major issue. Seventeen absentee ballots were counted, with fifteen being "Yes" votes and two being "No" votes. Eleven of those seventeen absentee ballots were questioned by reason of failure to fill in the ballot envelope affidavit. Two had no name or address, five had no address and four were not checked as to reason to vote absentee. There was no evidence showing whether each of the eleven voted "Yes" or "No" on the levy.

The state appellate court held that the irregularities in absentee voting coupled with confusing instructions on the official ballot warranted another school district election. In addition, the court ruled that an absentee ballot must be rejected where the affidavit on the ballot envelope has not been filled in.[44]

### 1.6c Recall of Board Members

In West Virginia, illegally discharged school employees brought an action to remove members of the county board of education from office on grounds that they had improperly used county funds to pay attorney fees accrued in their defense arising from the wrongful discharges, and had illegally diverted school board funds for the purpose of insulating board members from personal liability.

The state appellate court held that if school board members acted in good faith when they illegally discharged school personnel, it was

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44. Gasconade R-III School Dist. v. Williams, 641 S.W.2d 444 (Mo. Ct. App. 1982).

immaterial that they entered into a settlement with the aggrieved school personnel by which all damage issues were settled by payment of school board funds, in that if any damages had been recovered against members of the board as individuals, they would have had a right to indemnification from the board.

The court also stated that if the school board members did not act in good faith when they illegally discharged school personnel, further inquiry must be made as to whether there was significant likelihood that damages would have been awarded against the school board members personally rather than against school board members in their official capacity, and, if that likelihood exists, whether settlement into which members of the school board entered reflected an illegal diversion of school board funds for purposes of insulating individual members from personal liability.[45]

An interesting recall case arose in Iowa. Certain electors of the school district brought a proceeding to remove three defendants as school board members. The plaintiffs alleged that the trial court was wrong in holding that they had not proven by clear and convincing evidence any of their numerous allegations of willful misconduct and maladministration. The defendants contended that defendant Koster should not be removed because he had been reelected to his office in September 1979 following the filing of the removal petition in July 1979. The record before the court showed that defendants Benda and Coleman were elected in 1978. The term of a school board member is three years. At oral argument counsel for plaintiffs agreed that Benda and Coleman were reelected in September 1981. The reelection of the defendants during the pendency of this action required the court to address the issue of whether their removal had been mooted under the general rule that offenses committed during a previous term of office are generally held not to furnish cause for removal.

The state supreme court viewed state statutes as implementing a legislative intent that a public officer guilty of willful misconduct be removed during the same term of office in which the conduct occurred that provided grounds for removal. The court held that a subsequent reelection where the alleged grounds for removal are well known to the electorate should moot the action. It was held by the court that the voters of the district had a chance to evaluate the charges, and their subsequent reelection of the school board members ratified their conduct in office and mooted the issues raised in the removal petition.[46]

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45. Martin v. Mullins, 294 S.E.2d 161 (W. Va. 1982).
46. State *ex rel.* Doyle v. Benda, 319 N.W.2d 264 (Iowa 1982).

**1.6d Method of Selection of Board Members**

In *Hathorn v. Lovorn*,[47] the United States Supreme Court examined the issue of whether a state court may order implementation of a change in election procedures over objection that the change is subject to preclearance under section 5 of the Voting Rights Act.[48]

A 1964 Mississippi statute provided that the board of trustees of municipal school districts in the state shall consist of five members, and that in any county in which a district embraces the entire county "in which Highways 14 and 15 intersect," one trustee shall be elected from each supervisors district. The Louisville School District is coextensive with Winston County and is the only county in which Highways 14 and 15 intersect. Since 1960, the Louisville mayor and city council appointed three of the five members of the district's board of trustees, and Winston County voters residing outside Louisville elected the other two members. The county official never implemented the 1964 statute. The voters of Winston County filed an action seeking to enforce the 1964 statute.

The Chancery Court dismissed the complaint on the ground that the statute violated the state constitutional bar against local legislation. The Mississippi Supreme Court reversed and remanded, striking only the statute's reference to Highways 14 and 15 and upholding the remainder of the statute. The state supreme court denied plaintiff's petition for rehearing in which they argued for the first time that the Chancery Court could not implement the reformed statute until the change had been precleared under section 5 of the Voting Rights Act of 1965. On remand, the Chancery Court ordered an election pursuant to the redated statute under procedures prescribed by the court, but directed petitioners to submit the election plan to the United States Attorney General for preclearance under section 5. The Attorney General subsequently objected to the plan, and the Chancery Court ultimately concluded that its order would remain in force subject to compliance with the Voting Rights Act. Respondents once again appealed to the Supreme Court of Mississippi, which held that its prior decision was the law of the case and that the Chancery Court improperly conditioned the election on compliance with the Voting Rights Act.

The case was appealed to the United States Supreme Court which held that state courts had the power to decide whether preclearance requirements of the Voting Rights Act were applicable to a proposed change in election procedures and that state courts would be

47. 102 S. Ct. 2421 (1982).
48. 42 U.S.C.A. § 1973c, *amended by* 42 U.S.C.A. § 5.

required to withhold further implementation of a disputed change in election procedures for membership on the school board until the parties demonstrated compliance with the clearance requirements of section 5.[49]

The United States Supreme Court also handed down *Rogers v. Lodge*[50] in 1982. Burke County, Georgia, a large, predominantly rural county, had an at-large system for electing members of its governing board of commissioners. No black had ever been elected to the board. Several black citizens of the county filed a class action alleging that the at-large system of elections violated the fourteenth and fifteenth amendments by diluting the voting power of black citizens.

Finding that blacks had always made up a substantial majority of the county's population but that they were a minority of the registered voters, that there had been bloc voting along racial lines, and that past discrimination had restricted the present opportunity of blacks to participate effectively in the political process, the federal district court held that although the state policy behind the at-large electoral system was "neutral in origin," the policy was being maintained for invidious purposes in violation of plaintiff's constitutional rights. The court then ordered the county to be divided into districts for purposes of electing county commissioners.

The Fifth Circuit Court of Appeals affirmed the decision of the lower federal court.[51] The United States Supreme Court also affirmed the result and reasoning of the district court. The Court ruled that the district court applied the proper legal standard in ruling that demonstration of "intention" is necessary under both the fourteenth and fifteenth amendments as requisite to finding unconstitutional vote dilution. The Court also sustained the district court's choice of utilizing single-member districts as a remedy for the restriction of access to the county's black citizens to the electoral system and maintenance of the at-large system for invidious purposes.[52]

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49. *Accord*, Edge v. Sumter Cty. School Dist., 541 F. Supp. 53 (M.D. Ga. 1981). In *Edge*, the court ruled that where a change in the method of electing board members to an at-large method was made by the legislature and thus reflected the "policy choices of the elected representatives of the people," adoption of the at-large system was subject to preclearance of the Voting Rights Act. Therefore, the elections held under the at-large system were in violation of section 5 of the Act.

50. 102 S. Ct. 3272 (1982).

51. 639 F.2d 1358 (5th Cir. 1981).

52. *Accord*, NAACP v. Gadsden Cty. School Bds., 691 F.2d 978 (11th Cir. 1982), and Brown v. Board of School Comm'rs of Mobile Cty., Alabama, 542 F. Supp. 1078 (S.D. Ala. 1982). In *NAACP*, the eleventh circuit held that to prevail in a vote dilution case under the equal protection clause of the fourteenth amendment, a plaintiff must demonstrate (1) the existence of a discriminatory purpose in either the enactment or operation of the election scheme; and (2) differential impact, *i.e.*, dilution of the minority's voting power.

A federal district court from Georgia addressed the constitutionality of the single-member system for the election of school board members. This was an action pursuant to 42 U.S.C. § 1983 in which plaintiffs sought declaratory and injunctive relief. The plaintiffs claimed that they, as black citizens, were being denied the opportunity to participate effectively in the election of the members of the county school board. Before the court was the plaintiff's motion to enjoin the school board election which was scheduled for November 2, 1982.

The complaint was that the seven districts from which the members of the school board were scheduled to be elected were intentionally drawn to dilute the voting strength of black citizens. Although conceding that blacks were not entitled to proportional representation, the plaintiffs argued that the districts in question were drawn so as to concentrate blacks into one district and to thus minimize black voter strength by insuring that no more than one black board member would be elected.

The federal district court held that the plaintiffs had the burden of showing that the single-member school district plan was conceived as a purposeful device to further racial discrimination. However, the court stated that discriminatory purpose in school board districting need not be proven by direct evidence in civil rights actions. The court ruled that plaintiffs failed to establish that the plan was enacted with the purpose of limiting black voter strength and thus did not establish a substantial likelihood of success on the merits required to enjoin school board election.[53]

### 1.6e Disqualification of Candidates

Prior to the May 14, 1982, deadline, plaintiff, Burns, and defendants, Kurtenbach and Scholten, filed their nominating petitions for school board member with the business manager of Brookings School District in South Dakota. The school board election was scheduled for June 15, 1982. Burns was the only candidate who had signed the circulator's verification as required by state statute. The other candidates

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*Contra*, United States v. Dallas Cty. Comm'n, 548 F. Supp. 794 (S.D. Ala. 1982). In this case, the United States filed an action against a county and others alleging that the at-large election system used in the county unlawfully diluted the voting strength of the black electorate. With respect to the county board of education's motion to dismiss, the district court held that the at-large voting system for the county school board did not unlawfully dilute the voting strength of the black electorate of the county, as the factual findings indicated clearly that blacks register, vote, run for office, serve as election officials and otherwise participate fully in the election process in the county, without discrimination and without distinction of race, color or previous conditions of servitude.

53. Brantley v. Brown, 550 F. Supp. 490 (S.D. Ga. 1982).

relied on the advise of the business manager, who informed them that the circulator's verification need not be signed if the nominating petition had been circulated by a candidate or a member of his family.

The business manager died on May 17, 1982. Burns became aware that the other candidates had not executed the circulator's verification. Pursuant to the advice of the school district's attorney, the other candidates executed the verifications and backdated them to the date when each had originally submitted his petition to the district's business manager.

Burns commenced an action in circuit court challenging the validity of the other candidate's nominating petitions. On June 15, 1982, Kurtenbach and Scholten were elected to fill the two vacancies on the school board. The defendants contended that the Supreme Court of South Dakota did not have original jurisdiction in quo warranto in a case such as this. The state supreme court held that it did have jurisdiction in a quo warranto proceeding challenging the validity of school board candidates' nominating petitions. The court also ruled that the defendants were ineligible to serve as board members since their nominating petitions failed to contain an executed circulator's verification prior to the statutory deadline for filing, and backdating the document did not cure the defect nor did receipt of erroneous advice from the district's business manager excuse the candidates conduct in this case.[54]

## 1.7 SCHOOL DISTRICT ORGANIZATION

In a Missouri case involving the creation of a new school district, plaintiffs sought a compulsory directive that the commissioner of education and the state board of education implement procedures leading to an election for the establishment of a six-director school district in the city of St. Peters. The growing community of St. Peters is served by three school districts, each of which also includes rural areas of sizable proportions beyond the St. Peters city limits. With the stated intention of creating a new St. Peters School District, residents of St. Peters presented a petition bearing 625 signatures to the commissioner of education in July, 1978. The petition contained only the signatures of citizens residing in St. Peters.

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54. Burns v. Kurtenbach, 327 N.W.2d 636 (S.D. 1982). In a similar case, Havens v. Miller, 429 N.E.2d 1292 (Ill. Ct. App. 1981), candidates for school board were ineligible for office because they failed to follow mandatory requirements that nominating petitions include a sworn statement from the persons who circulated the sheet including a statement of his residence address, and that people who signed the petition were registered votes who gave their correct residence address.

The state appellate court held that the petition for creation of six-director school district in a city served by three school districts was insufficient to require implementation of procedures for creation of district where the petition was signed only by persons residing in one school district and not by any persons residing in the other two affected districts.[55]

In Nebraska, the board of education of Minden School District R-3 voted to authorize a joint petition with the board of education of Heartwell School District R-4 to change the boundaries of the two school districts. The board of education of Heartwell School District R-4 also voted to authorize the joint petition. The petition sought to change the boundaries of the two districts and detach the various tracts of land from the Heartwell district and attach, annex, and include them in the Minden district. The petition called for the transfer of twenty-eight parcels of land totaling 4,392 acres. None of the tracts to be transferred were contiguous to the Minden district. The plaintiffs contended that a school district must consist of one compact contiguous area of land within one set of boundary lines, and that under state law separate legally described tracts of land in one school district cannot be transferred to another school district to which they are not contiguous. The state supreme court held that the proposed reorganization was valid. The authorization to change school boundaries is not limited to lands in one compact contiguous area.[56]

## 1.8 SCHOOL BOARDS AND TRANSPORTATION OF STUDENTS

### 1.8a Bus Contracts

In a case from New York, Parochial Bus Systems and the board of education of the City of New York entered into a contract on September 7, 1981, whereby Parochial was to transport students to and from school. By mutual agreement, this contract was extended through June 30, 1979. On February 16, 1979, a competing transportation union staged a wildcat strike against other bus companies that transported students for the school board. This wildcat strike occurred during the period of February 16, 1979, through May 10, 1979.

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55. Naugher v. Mallory, 631 S.W.2d 370 (Mo. App. Ct. 1982).

56. Heartwell School Dist. v. Jepsen, 319 N.W.2d 68 (Neb. 1982). For a discussion of a similar issue, *see In re* Freeholders Petition, 316 N.W.2d 294 (Neb. 1982), in which the court stated that while the term "adjoin" as used in statute ordinarily means touching or having a common boundary, it may also include a situation where the boundaries, although not touching, are separated only by a streambed which is not part of any school district; thus, two school districts were adjoining even though separated by a river which did not lie within the boundaries of either district.

The vice president of Parochial stated in a sworn affidavit that he was unable to transport the school children because of violence accompanying the wildcat strike. The chairman of the union representing Parochial stated that his members, other than Parochial, were ready, willing and able to work during the strike. However, Parochial made a decision that it was too hazardous for the buses to run. During the entire strike period, 100 to 300 pickets were purportedly posted outside the Parochial terminal. As a result of the unavailability of Parochial, the school board found alternative methods of transporting its students by contracting with another bus company. The school board contended that Parochial could have provided bus service, without hazard, during the strike.

In an action brought by Parochial against the school board for damages during the period of the wildcat strike, the court held that evidence was sufficient to establish that the business company did not undertake even a minimal risk of crossing the picket line to run buses during the course of the strike, and thus evidence established that the company was unready and unwilling to attempt performance of its transportation contract and was not entitled to damages under the cessation of service clause in the contract.[57]

**1.8b Bids**

An action from New York raised questions as to the proper method for replacing services supplied pursuant to a city-wide contract for transportation of handicapped public school students if the bus company defaults. In 1979, the board of education, after public bidding pursuant to law, entered into a contract with Master Coachman Company for supplying transportation services to disabled students. While the contract was in force, a long strike of school bus drivers in New York City took place. A number of contractors defaulted since the strike, requiring the school board to replace their services. The Master Coachman Company brought suit contending that public bidding was not required for the replacement of bus companies which had defaulted on such transportation contracts. The court ruled that public bidding was the proper method for replacing bus services notwithstanding a provision in the original contract that if there was an increase in need of a specific type of vehicle during the life of the contract, the board might ask the contractor currently providing that service to provide an increase in service. The court dismissed Master Coachman's petition.[58]

57. Parochial Bus Sys., Inc. v. Board of Educ. of City of New York, 457 N.Y.S.2d 285 (N.Y. App. Div. 1983).

58. Master Coachman Co. v. Board of Educ. of the City of New York, 456 N.Y.S.2d 946 (N.Y. Sup. Ct. 1982).

A competitive bidding case was decided last year in Illinois. Plaintiff Willett Motor Coach Company brought an action for injunctive and declaratory relief against the board of education of Chicago and certain bus companies which sought: (1) revocation of three year contracts awarded for transportation of handicapped children; (2) a requirement that the board rebid those contracts; and (3) a declaratory judgment holding illegal the bidding procedure on which the contracts were predicated, and that all bids received pursuant thereto are null and void. Willett claimed that the board failed to mail and that it did not receive a "Notice to Bidders" containing an amendment to the board's original solicitation for bids. Holding for the plaintiff, the state appellate court held that absent evidence that rules promulgated by the school board with regard to competitive bidding and mailing procedures were actually followed in instance of first amendment to the bidding procedures on contacts awarded for transportation of handicapped students, the relief sought by the unsuccessful bidder was warranted.[59]

### 1.8c Duty to Provide Transportation

Defendant Alpena Public Schools, one of the largest in Michigan, serves approximately 6,850 students and covers an area in excess of 600 square miles. Prior to the eruption of this controversy, approximately 5,140 of those students were bused to and from school in thirty-nine buses provided by the district. The cost to the district was approximately seventy-five cents per student per mile. At that time, the State of Michigan was reimbursing the district for forty percent of the transportation costs. At the beginning of the 1981-1982 school year, all voter-approved operating millages of Alpena Public Schools had expired. The only funding available to the district was an allocated millage of 7.98 mills and state school aid payments.

The Alpena Board of Education conducted a meeting and assessed its options in light of the available funding. According to school officials, the projected cost of providing bus transportation for students for the remainder of the school year would be approximately $800,000. If the school district were to have implemented such a plan, it would have been forced to close some schools. Other possible ramifications were increased class sizes, reduction of counselling, and cutbacks in libraries, new supplies and books. Faced with such alternatives the board decided, in the exercise of its discretion, to stop providing student transportation. The Court of Appeals of Michigan held that while under the

59. Willett Motor Coach Co. v. Board of Educ. of City of Chicago, 431 N.W.2d 1190 (Ill. App. Ct. 1982).

state constitution citizens have a fundamental right to a free public education, neither the constitution nor state statute required the board to provide students with transportation to and from school. The court concluded that the local board did not abuse its discretion in deciding to stop providing transportation to and from school, in light of the shortage of funding.[60]

The law of the State of New Hampshire requires school districts to provide free school bus transportation to most pupils under the age of fourteen. Bus drivers began to complain about vandalism and disruptive conduct on certain bus routes. The private company supplying the bus service complained to the school board. After a hearing, the board adopted a policy where as a last resort, it could suspend the entire bus route for up to five days as a result of student disciplinary problems. The objecting parents claimed that their children were not the ones who caused the trouble. They attacked the suspension policy as unfair for it made their children suffer for the sins of others and they claimed it violated both state and federal law. The First Circuit Court of Appeals held that a school board's policy of suspending bus routes was not unreasonable even though the policy deprived pupils who took no part in any trouble-making activities of bus transportation.[61]

The issue of public transportation of parochial school students was litigated in an Indiana case. A group of parents sued the South Bend School Board asking that their children be transported to private schools and requested the board to furnish extra buses for that purpose. The parents raised various constitutional arguments upholding their view, but the court rejected those arguments and ruled that the federal and state constitutions do not require the state to provide parochial school children with transportation to and from school on the same terms as public school children.[62]

In Pennsylvania, the Albert Gallatin Area School District provides kindergarten classes for all eligible children residing in the district. The school district provides round-trip busing to elementary school children who attend the four public schools. The board in May of 1980, when considering a budget for the 1980-1982 school year, allocated sufficient funds to bus kindergarten children to and from their homes. At the July, 1980 meeting, however, the board decided not to utilize the allocated funds for round-trip busing, but rather, to allow

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60. Lintz v. Board of Educ., Alpena Pub. Schools, 325 N.W.2d 803 (Mich. Ct. App. 1982). *See also* Sutton v. Cadillac Area Pub. Schools, 323 N.W.2d 582 (Mich. 1982) (where the court held free public transportation is not required of Michigan public school districts).

61. Rose v. Nashua Bd. of Educ., 679 F.2d 279 (1st Cir. 1982).

62. Frame v. South Bend Commun. School Corp., [illegible] SS1-0344 (N.D. Ind. 1981).

kindergarten students to ride to school on the regular elementary school buses for the morning session or to ride home on the elementary buses at the close of the afternoon session.

This decision meant that the school district did not have to engage additional buses and drivers especially for the kindergarten children, during the middle of the day. It also meant that parents of kindergarten students had to assume the responsibility of transporting their children either to or from school, depending on which session their children attended.

The Third Circuit held that the decision of the board did not violate either the due process or equal protection clauses, in that the decision was supported by rational basis, namely, the savings of funds to school district which would result from not employing drivers or engaging buses at midday.

The United States Supreme Court in *San Antonio v. Rodriquez*[63] has conclusively rejected wealth as a suspect class, and education as a fundamental right. The court held that *San Antonio* made clear the error of the district court in applying the compelling state interest test in this case. The most the plaintiffs could seek, in the instant case, was the application of the traditional standard of review, which requires only that the state's system be shown to bear some rational relationship to a legitimate state purpose. The Third Circuit ruled that the board's decision, in the face of limited funds, was clearly rational.[64]

63. 411 U.S. 1 (1973).
64. Shaffer v. Board of School Dirs., 687 F.2d 718 (3rd Cir. 1982).